

RETAIL SECTOR

The retail industry is facing dynamic changes, seemingly on a daily basis. Throughout the industry, changing consumer behavior and the rapid advancement of technology have dramatically reshaped the legal and business environment.

Hodgson Russ uses its extensive, multi-disciplinary experience to assist retailers, suppliers, manufacturers, distributors, lenders, payment processors, and investors to navigate this volatile industry. We serve as counsel to a large regional supermarket chain, assist Canadian and other non-U.S. retailers in establishing footholds in the United States, and represent numerous restaurants, chain stores, automotive dealerships, retail building landlords, and companies selling wares over the internet through their own and third party sites. Our representation includes strategic advice and counsel on a comprehensive array of legal, corporate, and business-related matters, including franchising, antitrust and other competition issues, warranties, and insurance coverage, covering all aspects of our client's operations.

Cybersecurity

With nearly one in three retailers experiencing losses due to cyberattacks, no retailer can afford to underestimate the significant risks presented. From maintaining compliance with payment card data security requirements, complying with privacy laws, and guiding responses to data loss events, Hodgson Russ attorneys provide legal assistance in all phases of cybersecurity. We have advised on compliance with state Security Breach Notification Laws, drafted contracts with vendors, including technology transfer agreements, to ensure the security of customer data, and provided cybersecurity due diligence, including reviews of supply chain agreements, in all manner of transactions to protect clients against loss.

E-Commerce

As the rise of E-commerce has changed the global landscape for retailers, Hodgson Russ has provided comprehensive legal services to e-retailers. From assisting with implementation of enforceable clickwrap agreements, complying with the different mandates of multiple state jurisdictions, and creating enforceable contracts throughout the supply chain, Hodgson Russ guides the efforts of physical and virtual retailers through the full spectrum of activities. We regularly advise clients on software licensing, website arrangements, and cloud-based service agreements essential to our client's business. We draft, review, and assist in enforcing agreements with third-party sellers and guide legal aspects of shipping, warehousing, and repair and warranty efforts for participants in this marketplace.

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Sales Tax and Multistate “Nexus” Issues

Hodgson Russ has provided extensive advice on all aspects of sales tax liability. Of particular concern are the recent changes to states’ efforts to tax out-of-state retailers. “Nexus” is the constitutional concept that governs how much contact is sufficient to allow a state to impose tax obligations on an out-of-state business. For nearly 50 years, nexus for sales and use tax purposes was governed by a “physical presence” standard—a product of the U.S. Supreme Court’s decisions in *Quill Corp. v. North Dakota*, and earlier in *National Bellas Hess v. Illinois*. In other words, unless an out-of-state seller had some form of physical presence in the state, a state could not obligate that seller to collect or pay sales tax on its in-state sales.

This changed in 2018 when the U.S. Supreme Court sent shockwaves through the internet — and the state and local tax community — by issuing its long-awaited decision in *South Dakota v. Wayfair Inc.* and resoundingly overturning the physical-presence nexus standard. The Court held that the “physical presence rule [has] become further removed from economic reality” with every passing year. In the view of a majority the Court, the growth of e-commerce and internet sales has made the *Quill* physical presence standard unworkable and unreliable as precedent. South Dakota’s law requires a seller to collect and remit the South Dakota sales tax if it: (i) delivers more than \$100,000 of goods and services into South Dakota, or (ii) engages in 200 or more transactions for the delivery of goods or services into South Dakota. The Supreme Court held that these limitations — along with prospective-only applicability and South Dakota’s participation in the multistate Streamlined Sales and Use Tax Agreement — appear “designed to prevent discrimination against or undue burdens upon interstate commerce.” In the wake of the Court’s decision, the majority of states have now passed or proposed similar laws.

This means that economic activity alone (i.e., a threshold level of in-state sales) can now suffice to obligate an out-of-state seller to register and begin collecting sales tax. With these drastic changes to sales and use tax collection requirements, online retailers and others are facing new uncertainty in multistate compliance. And the rise of selling through online “marketplace” sites, such as Amazon’s “FBA” (“Fulfillment by Amazon”) program, have only increased the number of new questions facing online retailers. Hodgson Russ attorneys have remained at the forefront in such issues, helping businesses navigate these multistate nexus issues, including, when warranted, taking advantage of valuable multistate voluntary compliance initiatives to reduce exposure.

Intellectual Property

Retailers face multiple intellectual property challenges, in protecting their own trademarks and in responding to claims regarding merchandise they handle. Our firm has a long history of assisting in creating trademark rights, including right-to-use evaluations, preparing and filing Statements of Use, and protecting them in multiple jurisdictions, including responding to U.S. Patent and Trademark Office Actions. We draft cease-and-desist letters to protect against trademark infringers and defend against claims alleging trademark infringement, including representing retailers in trademark opposition and cancellation proceedings at the Trademark Trial and Appeal Board. We draft and enforce license agreements and protect domain names and business name registrations.

Real Estate

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Our clients demand strategic insight and complex problem solving for their retail real estate projects. Hodgson Russ's multi-disciplinary, cross border practice provides the strategy and insight our clients require. Our experience representing landlords and tenants helps inform our work for lenders and investors evaluating risk and return, as well as our work for developers creating retail projects. When we represent 1031 investors selling or buying into retail projects, we are mindful that evaluation of the legal risks associated with the retail lease significantly impacts the value of the investment. We provide comprehensive services for retail projects, including overseeing all aspects of purchase and sale transactions, preparing and negotiating complex shopping center and high-end retail leases, securing title insurance, closing financing transactions for real estate development projects, structuring developer agreements and construction contracts, and handling all aspects of environmental and land use issues.

Labor and Employment; Employee Benefits

Hodgson Russ represents retailers with respect to all labor and employment matters, providing assistance with onboarding and hiring policies and procedures, development and implementation of compliant and effective labor practices, union avoidance, defense of harassment and discrimination claims, counsel regarding compliance with employee leave laws (e.g., FMLA, Americans with Disabilities Act), worker misclassification, employee discipline, wage and hour matters (including FLSA), and termination of employees. We regularly appear before the National Labor Relations Board and other hearing boards and tribunals, handle ERISA matters, and negotiate on behalf of clients in union representation proceedings and contract arbitrations. We regularly draft executive compensation agreements, non-compete agreements, and termination agreements. Our team provides advice on pension obligations, health care plans, the Affordable Care Act, and other employee benefit issues, as well as providing assistance with immigration matters. Hodgson Russ has also represented retailers in audits before the IRS and departments of labor, and defended retailers before the Equal Employment Opportunity Commission, National Labor Relations Board, and federal and state courts

Litigation

We represent retail sector clients in all matters of commercial litigation, including breach of contract, real estate matters, landlord-tenant disputes, employee claims, franchise agreement disputes, and numerous other areas. We regularly advise on and litigate insurance coverage disputes and product liability claims. We enforce distributorship rights and defend intellectual property claims. We regularly appear before administrative tribunals such as the Equal Employment Opportunity Commission and National Labor Relations Board, and have successfully represented retail and e-commerce clients in numerous disputes in the federal and state courts, as well in arbitration and mediation proceedings.

Experience

Hodgson Russ attorneys represented senior management in their purchase of a leading full-service grocery retailer in upstate New York, northern Pennsylvania, and western Vermont. The grocery retailer operates 155 full-service supermarkets and has more than 15,000 associates. Hodgson Russ also represented the senior management group in the financing of this purchase.

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Hodgson Russ acts as outside counsel to a Germany-based manufacturer and retailer of luxury consumer products with respect to U.S. distribution law matters.

A Hodgson Russ team represented a retail company in the rent-to-own industry in a series of acquisitions of hundreds of stores. The team also represented the company in several securities offerings and debt financings. Robert B. Fleming, Jr. led the Hodgson Russ team that served this client.

In the News

Gary Schober Gives Insight to Wegmans' Discontinuation of SCAN App
WGRZ, September 15, 2022

Press Releases

Two Hodgson Russ Attorneys Selected to Author Monthly Columns in Tax Notes State
Hodgson Russ Press Release, April 27, 2020

Labor and Employment Attorney Charles H. Kaplan Joins Hodgson Russ
Hodgson Russ Press Release, March 24, 2020

Publications

Re-tooling Your Business to Respond to the Coronavirus Pandemic? Here's What You Need to Know
Hodgson Russ Business Litigation Alert, April 9, 2020

California Amends Proposition 65 Notification Requirements
Hodgson Russ Litigation Alert, April 6, 2020

McDonald's and Its Franchisees: The General Counsel for the National Labor Relations Board Asserts That McDonald's, USA, LLC Is a Joint Employer
Employers' Advisor Blog Archives, August 6, 2014